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SECOND REPORT ON RESERVATIONS TO TREATIES

by

Alain Pellet, Special Rapporteur

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CHAPTER I

OVERVIEW OF THE STUDY

Section 1. First report on reservations to treaties and the outcome

1. In accordance with the wishes of the General Assembly, 1/ the Special Rapporteur presented to the forty-seventh session of the Commission a preliminary report on the law and practice relating to reservations to treaties. 2/ In three chapters, this report:

- Gave a brief description of the Commission's previous work on reservations and the outcome;

- Provided a brief inventory of the problems of the topic; and

- Put forward a number of suggestions as to the scope and form of the Commission's future work.

2. In accordance with the Commission's consideration of the topic, the Special Rapporteur summarized as follows the conclusions he has drawn from these debates:

(a) The Commission considers that the title of the topic should be amended to read "Reservations to treaties";

(b) The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's Statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

(c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;

(d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions. 3/

1/ General Assembly resolution 48/31 of 9 December 1993, para. 7.

2/ A/CN.4/470.

3/ Report of the International Law Commission on the work of its forty-seventh session, Official Records of the General Assembly, Fiftieth session, Supplement No. 10 (A/50/10), para. 491.

3. In the Commission's view, these conclusions constituted "the result of the preliminary study requested by General Assembly resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. The Commission understood that the model clauses on reservations, to be inserted in multilateral treaties, would be designed to minimize disputes in the future." 4/

4. Following the Sixth Committee's discussions of the Commission's report, the General Assembly, in its resolution 50/45 of 26 January 1996, noted the beginning of the work of the Commission on this topic and invited it "to continue its work on [this topic] along the lines indicated in the report". 5/

5. Moreover, at its 2416th meeting on 13 July 1995, the Commission "authorized the Special Rapporteur to prepare a detailed questionnaire, as regards reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which are depositaries of multilateral conventions". 6/ In its above-mentioned resolution 50/45, the General Assembly had invited "States and international organizations, particularly those which are depositaries, to answer promptly the questionnaire prepared by the Special Rapporteur on the topic concerning reservations to treaties". 7/

6. In accordance with these provisions, the Special Rapporteur prepared a detailed questionnaire, the text of which was sent by the Secretariat to States Members of the United Nations or of a specialized agency, or parties to the Statute of the International Court of Justice, and will be distributed at the forty-eighth session of the Commission as document ILC (XLVIII)/CRD.1. Thus far, 12 States 8/ have replied to the questionnaire. With the exception of San Marino, these States have answered only the questions to which the Special Rapporteur particularly drew attention and which most closely concern the matters dealt with in this report; 9/ several of them have included with their replies a large amount of very interesting documentation on their practice with regard to reservations.

7. Furthermore, the Special Rapporteur has prepared a similar type of questionnaire that will soon be sent to international organizations which are

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4/ Ibid., para. 492.

5/ General Assembly resolution 50/45, para. 4.

6/ Op. cit. (footnote 3 above), para. 493.

7/ Para. 5.

8/ Canada, Chile, Denmark, Ecuador, Estonia, Finland, San Marino, Slovenia, Spain, Switzerland, the United Kingdom and the United States of America. The Special Rapporteur wishes to express his profound gratitude to these States. He hopes it will be possible for them to complete their replies and that other States will reply to the questionnaire in the near future.

9/ Cf. para. 6 of the covering note of the questionnaire.

depositories of multilateral treaties, the text of which will be distributed later.

8. In addition, as the Special Rapporteur promised last year, 10/ a non-exhaustive bibliography on the question of reservations to treaties has been distributed as document A/CN.4/478.

Section 2. The future work of the Commission on the topic of reservations to treaties

Paragraph 1. Area covered by the study

9. In his preliminary report, the Special Rapporteur endeavoured to draw up a "brief inventory of the problems of the topic", 11/ noting that it was far from exhaustive, and without placing the topics in order of their importance or of their logical relationship to each other.

10. Although establishing a "general problem" had not been central to the Commission's discussions on this topic at its forty-seventh session, these had allowed some useful clarifications to be made in this respect. 12/ Five main substantial issues were fully debated during the discussion of the preliminary report. 13/

- The definition of reservations, the distinction between them and interpretative declarations and the differences of legal regime which characterize the two institutions; 14/

10/ Cf. A/CN.4/470/Corr.1.

11/ A/CN.4/470, chap. II, paras. 91-149; see in particular paras. 124, 148 and 149, in which the Special Rapporteur has enumerated the main problems which, according to him, are connected with the ambiguities and gaps in the provisions relating to reservations in the 1969, 1978 and 1986 Vienna Conventions.

12/ Cf. the relevant part of the summary of discussions in paras. 446-470 of the report of the Commission referred to in footnote 3.

13/ See the summary record of the discussion of this point by the Special Rapporteur, ibid., paras. 477-482, and the provisional summary record of the 2412th session (A/CN.4/SR.2412), 28 July 1995, pp. 7-8.

14/ See Mr. Tomuschat, A/CN.4/SR.2401, 28 June 1995, p. 5; Mr. Robinson, A/CN.4/SR.2402, 26 June 1995, p. 8; Mr. Lukashuk, ibid., p. 14; Mr. He, ibid., p. 17; Mr. Pambou-Tchivounda, A/CN.4/SR.2404, 28 June 1995; Mr. Eirikson, ibid.; Mr. Elaraby, ibid., p. 17; Mr. Rao, ibid.; Mr. Yamada, A/CN.4/SR.2407, 17 July 1995, p. 10 and 11; Mr. Al-Baharna, A/CN.4/SR.2412, 28 July 1995, p. 6.

- The doctrinal quarrel (which has, however, important practical consequences) between the permissibility and opposability schools, 15/ which will have a bearing, eventually, on what may probably be considered prima facie as the main problem raised by the subject: conditions for the permissibility and opposability of reservations; 16/

- The settlement of disputes; 17/

- The effects of the succession of States on reservations and objections to reservations; 18/ and

- The question of the unity or diversity of the legal regime applicable to reservations based on the subject of the treaty to which they are made. 19/

11. Accordingly, the members of the Commission have given the Special Rapporteur useful information, if not on the order in which problems should be dealt with, 20/ then at least on the matters to which special attention should be paid.

12. Likewise, the discussions of the Sixth Committee during the fiftieth session of the General Assembly make it possible to have a more precise idea of

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15/ Briefly, the "permissibilists" may be thought of as considering that a reservation incompatible with the object and purpose of the treaty is invalid ab initio, while the "opposabilists" think that the sole criterion for the validity of a reservation is the position taken by the other contracting States. For further (but preliminary) details on this point, see A/CN.4/470, particularly paras. 100-107.

16/ See Mr. Tomuschat, A/CN.4/SR.2401, 28 June 1995, p. 5; Mr. Bowett, ibid., p. 6; Mr. Elaraby, A/CN.4/SR.2404, 28 June 1995, p. 17; Mr. Kabatsi, A/CN.4/SR.2406, 4 July 1995; Mr. Yamada, ibid.

17/ See Mr. Robinson, A/CN.4/SR.2402, 26 June 1995, pp. 7-9; Mr. Villagran Kramer, A/CN.4/SR.2403, 7 July 1995, pp. 7-9.

18/ See Mr. Mikulka, A/CN.4/SR.2406, 4 July 1995, p. tba and A/CN.4/SR.2407, 17 July 1995, p. tba; Mr. Eirikson, ibid.

19/ See Mr. Robinson, A/CN.4/SR.2402, 26 June 1995, p. 11; Mr. Kramer, A/CN.4/SR.2403, 7 July 1995, p. 8; Mr. de Saram, A/CN.4/SR.2404, 28 June 1995, p. 3; Mr. Rao, ibid., [not found]; Mr. Idris, A/CN.4/SR.2407, 17 July 1995, p. 6; Mr. Yamada, ibid., pp. 10-11.

20/ Some members of the Commission, however, have expressed useful opinions in this respect. It is worth noting in particular that several members remarked that "the problems of reservations to treaties and objections to reservations linked with the succession of States should not be one of the Commission's priorities". Report (footnote 3 above), para. 465.

the points which preoccupy States in this regard. 21/ It should be noted in particular that their representatives stressed two essential, basic problems:

- The question of reservations and human rights treaties; 22/ and

- The distinction between interpretative declarations and reservations. 23/

Moreover, some representatives called upon the Commission to clarify the following points: the effects of non-permissible reservations; the regime of objections to reservations; and both the precise difference between reservations and interpretative declarations and the exact definition of the legal effect of the latter. 24/

13. It is interesting and, in many respects, comforting, to see such a striking unanimity of views between the positions adopted by the members of the Commission on the one hand 25/ and the representatives of States on the other, regarding the "hierarchy" of problems posed - or left unresolved - by the current legal regime governing reservations to treaties.

14. It therefore seems legitimate to consider, since "the Sixth Committee as a body of government representatives and the International Law Commission as a body of independent legal experts" 26/ agree on the special importance of certain topics, that those topics should be studied particularly carefully. Without a doubt, that is the case with:

- The question of the very definition of reservations;

- The legal regime governing interpretative declarations;

21/ See Report of the International Law Commission on the work of its forty-seventh session (1995), Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session prepared by the Secretariat (A/CN.4/472/Add.1), E. The law and practice relating to reservations to treaties, paras. 143-174.

22/ Ibid., paras. 155-161; see also the views of the delegations of the United States of America, A/C.6/50/SR.13, 23 October 1995, paras. 50-53; of Spain, A/C.6/50/SR.18, 8 November 1995, para. 62 and A/C.6/50/SR.22, 21 November 1995, para. 44; of Lebanon, A/C.6/50/SR.25, 1 December 1995, para. 20; and of Sri Lanka, A/C.6/50/SR.24, 7 November 1995, para. 82.

23/ Topical summary (footnote 21 above), paras. 162-167; see also the views of the delegations of Venezuela, A/C.6/50/SR.24, 7 November 1995, para. 56, and of the Republic of Korea, ibid., para. 93.

24/ Report (footnote 21 above), para. 148.

25/ See para. 10 above.

26/ See General Assembly resolution 50/45, seventh preambular paragraph.

- The effect of reservations which clash with the purpose and object of the treaty;

- Objections to reservations;

- The rules applicable, if need be, to reservations to certain categories of treaties and, in particular, to human rights treaties.

15. This list of particularly important questions does not, however, limit the Commission's field of study regarding reservations to treaties. Both the Commission itself in raising this topic 27/ and the General Assembly in approving its proposal 28/ alluded in the general sense to "the law and practice relating to reservations to treaties" without specifying or circumscribing the questions which should be the subject of such a study. Moreover, it seems difficult to make a serious study of the questions listed above 29/ and to usefully elaborate draft articles in respect of them without placing them in the wider context of the law relating to reservations to treaties. In addition, it would be hard to envisage drawing up a "guide to practice" that would only contain controversial points; if such a guide is to be used by States and international organizations, its "users" should be able to find in it the answers to all their questions on the topic.

16. It therefore seems logical to take account of the broader picture in considering questions relating to reservations which are imperfectly addressed or not addressed at all by existing conventions on codification, 30/ while at the same time devoting particular and primary attention to questions which the International Law Commission and the Sixth Committee both consider to be of special importance and recalling the applicable rules as codified by existing conventions or resulting from practical application.

17. Moreover, as the preliminary report on the topic states, the relatively long list of questions partially or not covered by the 1969, 1978 and 1986 Conventions should be supplemented by other questions relating to the existence of what one might call "rival" institutions of reservations aimed at modifying participation in treaties, but, like them, putting at risk the universality of the conventions in question (additional protocols; bilateralization; selective acceptance of certain provisions, etc.). 31/ There is no doubt that, considered in themselves, such approaches are not part of the field of study, in

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27/ See the Report of the International Law Commission on the work of its forty-fifth session, Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), para. 427.

28/ General Assembly resolution 48/31 of 9 December 1993, para. 7.

29/ Para. 14.

30/ See footnote 11 above and the questionnaires sent to States and international organizations.

31/ See footnote 2 above, para. 149.

that they are not reservations. However, to the extent that they have similar aims and comparable consequences, it would seem useful to take account of them when necessary, if only to draw the attention of States to the options which they offer in certain cases; after all, they can prove useful alternatives to the employment of reservations when recourse to the latter meets objections of a legal or political nature. Moreover, reservations to these instruments themselves raise specific problems which cannot be ignored. 32/

Paragraph 2. Form of the study (review)

18. As mentioned above, 33/ the Commission decided in principle during its forty-seventh session to draw up a "guide to practice in respect of reservations" and took the view that there were insufficient grounds for amending the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions, it being understood that the draft would, if necessary, be accompanied by "model clauses". These conclusions, which were endorsed by the majority of the members of the Sixth Committee, 34/ were approved by the General Assembly. 35/

(a) Preserving what has been achieved

19. The decision to preserve what has been achieved by the Vienna Conventions with regard to reservations provides a firm basis for the Commission's future work. 36/ Specifically, it follows from this that the starting-point for the present study should necessarily comprise:

- Articles 2, paragraph 1 (d), and 19 to 23 of the Vienna Convention on the Law of Treaties of 23 May 1969;

- Articles 2, paragraph 1 (j), and 20 of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978; and

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32/ See ibid., paras. 145-147; the brief examples listed relate to additional protocols on the one hand and the bilateralization approach - employed frequently in conventions relating to private international law - on the other.

33/ Paras. 2 and 3.

34/ See Topical summary (footnote 21 above), para. 147.

35/ General Assembly resolution 50/45, para. 4.

36/ See on this topic A/CN.4/470 (footnote 2 above), chap. III, sect. 1, Preserving what has been achieved, paras. 153-169.

- Articles 2, paragraph 1 (d), and 19 to 23 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986. 37/

20. This decision is also a constraint in that the Commission must ensure that the draft articles which it will eventually adopt conform in every respect to these provisions, with regard to which it should simply clarify any ambiguities and fill in any gaps. 38/

21. The Special Rapporteur therefore undertook in subsequent reports to systematically repeat the relevant provisions of existing conventions in respect of each point he took up in order to indicate their connection with the draft articles whose adoption he was proposing and to establish their conformity with the letter and spirit of those provisions.

22. Moreover, it would probably be advisable to quote the actual text of the existing provisions at the beginning of each chapter of the draft guide to practice in respect of reservations.

(b) Draft articles accompanied by commentaries ...

23. These provisions should in each case be followed by a statement of additional or "clarificatory" regulations which would comprise the actual body of the study and, as the Commission indicated during its forty-seventh session, 39/ would be presented in accordance with its normal practice, "in the form of draft articles whose provisions would be accompanied by commentaries".

(c) ... and model clauses

24. In addition, the draft articles themselves would, if necessary, be followed by model clauses which, pursuant to the instructions of the Commission, would be worded in such a way as "to minimize disputes in the future". 40/

37/ These provisions are reproduced in extenso, ibid., paras. 60, 70 and 89.

38/ Of course, the Commission also considered that the arrangements which it had adopted, including the steps to preserve what had been achieved, "should be interpreted with flexibility" and that, "if it felt that it would have to depart from them substantially, if would submit new proposals to the General Assembly on the form the results of its work might take". (Report (footnote 3 above), para. 491), which implies that if there is a pressing need, it could suggest that some of the rules articulated in the 1969, 1978 and 1986 Conventions should be reconsidered. The Special Rapporteur believed that such a course should and could only be embarked upon after careful thought.

39/ See above, paras. 2 and 3.

40/ See above, para. 3.

25. The function of these model clauses should be clearly understood.

26. The "guide to practice" which the Commission intends to draw up is intended to indicate to States and international organizations "guidelines for [their] practice in the respect of reservations". 41/ It will therefore consist of general rules designed to be applied to all treaties, whatever their scope, 42/ in cases where the treaty provisions are silent. However, like the actual rules of the Vienna Conventions 43/ and the customary norms which they enshrine, 44/ these rules will be purely residual where the Parties concerned have no stated position; they cannot be considered binding and the Contracting Parties will naturally always be free to disregard them. All the negotiators need to do is incorporate the specific clauses relating to the reservations into the treaty.

27. The interest shown in the idea of incorporating clauses relating to reservations into multilateral treaties has frequently been commented on 45/ Thus, in its advisory opinion of 28 May 1951 regarding Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice noted the disadvantages that could result from the profound divergence of views of States regarding the effects of reservations and objections and asserted that "an article concerning the making of

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41/ Report (footnote 3 above), para. 491 (b).

42/ See below, chap. II.

43/ See, inter alia, Adolfo Maresca, Il Diritto dei trattati - La Convenzione codificatrice di Vienna del 23 Maggio 1969 (Milan, Giuffrè, 1971), pp. 289 and 304; Pierre-Henri Imbert, Les réserves aux traités multilatéraux: évolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951 (Prédone, Paris, 1979), pp. 160-161 and 223-230; J. M. Ruda, Reservations to Treaties (RCADI 1975-III, vol. 146, p. 180) or Paul Reuter, Introduction au droit des traités (Third edition, revised and enlarged by Philippe Cahier, PUF, Paris, IUHEI, Geneva, 1995), pp. 73-75; this was also the position of the International Court of Justice (Reports, 1951, p. 26, cited below, para. 27) and of the authors of the joint dissenting opinion ("States negotiating a convention are free to modify both the rule [the customary rule which they believe to exist] and the practice by making the necessary express provision in the convention and frequently do so", ibid., p. 41).

44/ See preliminary report (footnote 2 above), paras. 154-157.

45/ Even if no panacea has been identified; see in this regard P.-H. Imbert, op. cit. (footnote 43), who says that "reservation clauses are not an ideal solution in every case, but are always preferable to silence in the treaty" (p. 214); see the chapter devoted to "the reduced role of treaty clauses in the law on the admission of reservations" (pp. 202-230).

reservations could have obviated [such disadvantages]". 46/ Moreover, the Commission stated in its 1951 report to the General Assembly that:

> "It is always within the power of negotiating States to provide in the text of the convention itself for the limits within which, if at all, reservations are to be admissible and for the effect that is to be given to objections taken to them, and it is usually when a convention contains no such provisions that difficulties arise. It is much to be desired, therefore, that the problem of reservations to multilateral conventions should be squarely faced by the drafters of a convention text at the time it is being drawn up; in the Commission's view, this is likely to produce the greatest satisfaction in the long run". 47/

And by its resolution 598 (VI) of 12 January 1952, the General Assembly recommended:

> "that the organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and the effect to be attributed to them".

28. These clauses may have a triple function:

- They may refer to the rules articulated in the 1969 and 1986 Conventions explicitly 48/ or implicitly by reproducing the wording of some of their provisions; 49/

46/ Reports, 1951, p. 26.

47/ Report of the International Law Commission covering the work of its third session 16 May to 27 July 1951, Official Records of the General Assembly, Sixth session, Supplement No. 9 (A/1858), para. 27.

48/ See article 75 of the Inter-American Human Rights Convention: "This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on 23 May 1969".

49/ See, for example, article 28, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 (which, moreover, repeats the wording of article 20, paragraph 2, of the Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966 and hence predates the adoption of the 1969 Vienna Convention), which states that: "A reservation incompatible with the object and purpose of the present Convention shall not be permitted ..."; see also article 51, paragraph 2, of the Convention on the Rights of the Child of 20 November 1989, or article 91, paragraph 2, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990.

- They may fill in any gaps and clarify any ambiguities by amplifying obscure points or points that were not addressed in the Vienna Conventions;

- They may derogate from the Vienna rules by stipulating a special regime in respect of reservations which contracting parties would consider more suitable for the purposes of the particular treaty they had concluded.

29. The model clauses which the Commission intends to suggest as part of the study on reservations to treaties cannot be patterned after the first of these examples: although such clauses would indubitably ensure the uniform application of a reservations regime, whether the parties to the treaty have ratified the Vienna Conventions or not, they would leave intact all the gaps and ambiguities in the relevant provisions of those conventions. Moreover, it will not be the function of the model clauses to fill in those gaps or clarify those ambiguities: that is, precisely, the purpose of the "guide to practice" which the Commission is to prepare. On the other hand, it might be useful if in future contracting States and international organizations were to incorporate reservations clauses reproducing the draft articles to be included in the future guide to practice so as to ensure that those articles become crystallized into customary norms.

30. However, the model clauses, to be appended to the draft articles proper, will have a different function. The sole aim will be to encourage States to incorporate in certain specific treaties the model clauses concerning reservations, which derogate from general law and are better adapted to the special nature of these treaties or the circumstances in which they are concluded. This would have the advantage of adapting the legal regime concerning reservations to the special requirements of these treaties or circumstances, thus preserving the flexibility to which both the Commission and the representatives of States are rightly attached, without calling in question the unity of the general law applicable to reservations to treaties.

31. Of course, this technique can only be used for treaties that are concluded in the future. In the case of treaties already in force there are only two options, either to amend them or to adopt an additional protocol on reservations, a course which would certainly raise difficult problems.

(d) Final form of the guide to practice

32. The guide to practice in respect of reservations which the Commission intends to prepare in accordance with the General Assembly's invitation should be divided into chapters. 50/ Each of these chapters should take the following form:

- Review of the relevant provisions of the Vienna Conventions of 1969, 1978 or 1986;

50/ See "Paragraph 3" below.

- Commentary on those provisions, bringing out their meaning, their scope and the ambiguities and gaps therein; 51/

- Draft articles aimed at filling the gaps or clarifying the ambiguities;

- Commentary to the draft articles;

- Model clauses which could be incorporated, as appropriate in specific treaties and derogating from the draft articles;

- Commentary to the model clauses.

Paragraph 3. General outline of the study

(a) Characteristics of the proposed outline

33. In accordance with resolution 48/31 of 9 December 1993, the preliminary study which the General Assembly requested the International Law Commission to prepare concerned the final form to be given to the Commission's work on reservations to treaties, rather than the content of the study to be undertaken. Although it is probably unnecessary to establish at the outset a complete and rigid plan for the study, it would nevertheless seem useful to think about a general outline on which the Commission could base its future work on the topic.

34. The Special Rapporteur considers that such an outline should meet the following requirements:

1. It should make it possible to cover the entire topic of "reservations to treaties", so that States and international organizations can find in the guide to practice that will be the outcome of the Commission's work all the elements that are useful in this regard;

2. It should also highlight the problems to which no satisfactory solution has yet been found and about which States and international organizations are rightly concerned;

3. It should, moreover, be sufficiently clear and simple to enable the members of the Commission and the representatives of States in the General Assembly to follow the progress of the work without too much difficulty;

4. It should result in a guide to practice that is really utilizable by States and international organizations; although the study can certainly not ignore theoretical considerations completely - if only because they have substantial practical consequences - such considerations should not dictate the general approach to the topic.

51/ This should consist essentially of a brief review, based on the relevant passages of the aforementioned preliminary report (footnote 2).

which according to the Special Rapporteur should be pragmatic rather than theoretical; and

5. It should provide a general framework that can be adapted and supplemented as required as the Commission proceeds with its work.

35. The Special Rapporteur based the outline which follows (see para. (b) below) on the following elements:

1. The relevant provisions of the 1969, 1978 and 1986 Vienna Conventions, which in his view seem to be the essential starting-point for any thinking about the content of the study, since it has been agreed that the latter must "preserve what has been achieved"; 52/

2. The non-exhaustive summary of the problems posed by the topic which the Special Rapporteur attempted to provide in his preliminary report; 53/ although this list was drawn up on the basis of a cursory study of the travaux préparatoires for the three Vienna Conventions and of doctrine, no fundamental objections were raised to it during the discussion of that report;

3. The discussions in the Commission and subsequently in the Sixth Committee of the General Assembly on the topic of reservations to treaties, which made it possible to gain a more complete and more accurate idea of the problems posed by the topic and to "hierarchize" them in the light of the concerns expressed by the members of the Commission and the representatives of States; 54/

4. The replies of States to the questionnaire drawn up by the Special Rapporteur 55/ and the documents received from international organizations. 56/

36. Moreover, this outline is entirely provisional and is intended to give the members of the Commission an overall view of the Special Rapporteur's current intentions; he would welcome their reactions and suggestions in that connection.

52/ See paras. 19 to 22 above.

53/ See para. 9 above and the references given in footnote 11.

54/ See para. 1 and paras. 9-17 above.

55/ See para. 6 above.

56/ See preliminary report (footnote 2 above), footnote 196.

(b) Provisional general outline of the study

37. PROVISIONAL PLAN OF THE STUDY 57/

I. UNITY OR DIVERSITY OF THE LEGAL REGIME FOR RESERVATIONS TO MULTILATERAL TREATIES (reservations to human rights treaties)

A. Unity of rules applicable to general multilateral treaties (148 (xi))

(a) The legal regime for reservations is generally applicable;

(b) The legal regime for reservations is generally applied.

B. Control mechanisms (124 (vii), 148 (xiii) and (xiv))

(a) Use of control mechanisms to evaluate the permissibility of reservations;

(b) Consequences of the determination of a non-permissible reservation.

II. DEFINITION OF RESERVATIONS

(a) Positive definition (1969 and 1986, art. 2.1 (d); 1978, art. 1 (j));

(b) Distinction between reservations and other procedures aimed at modifying the application of treaties (149);

(c) Distinction between reservations and interpretative declarations (148 (iii));

(d) The legal regime of interpretative declarations (148 (iv), (v) and (vi));

(e) Reservations to bilateral treaties (148 (i) and (ii)).

57/ The relevant articles of the 1969, 1978 and 1986 Vienna Conventions (where no number is noted, the problem is not dealt with in these conventions) and references to the questions formulated in paragraphs 124, 148 and 149 of the above-mentioned preliminary report (A/CN.4/470) are noted in parentheses following each heading.

III. FORMULATION AND WITHDRAWAL OF RESERVATIONS, ACCEPTANCES AND OBJECTIONS 58/

A. Formulation and withdrawal of reservations

(a) Acceptable times for the formulation of a reservation (1969 and 1986, art. 19, chapeau);

(b) Procedure regarding formulation of a reservation (1969 and 1986, art. 23.1 and 4);

(c) Withdrawal (1969 and 1986, art. 22.1 and 3 (a) and 23.4).

B. Formulation of acceptances of reservations

(a) Procedure regarding formulation of an acceptance (1969 and 1986, art. 23.1 and 3);

(b) Implicit acceptance (1969 and 1986, art. 20.1 and 5);

(c) Obligations and express acceptance (1969 and 1986, art. 20.1, 2, and 3) (124 (ii), 148 (xii)).

C. Formulation and withdrawal of objections to reservations

(a) Procedure regarding formulation of an objection (1969 and 1986, art. 23.1 and 3);

(b) Withdrawal of an objection (1969 and 1986, art. 22.2 and 3 (b) and 23.4).

IV. EFFECTS OF RESERVATIONS, ACCEPTANCES AND OBJECTIONS

- Permissibility or opposability? Statement of the problem.

A. Prohibition of certain reservations

(a) Difficulties relating to the application of reservation clauses (1969 and 1986, art. 19 (a) and (b));

(b) Difficulties relating to the determination of the object and purpose of the treaty (1969 and 1986, art. 19 (c));

(c) Difficulties relating to the customary nature of the rule to which the reservation applies (148 (xv), (xvi) and (xvii));

58/ To the extent that the role of depositories seems, in the predominant system, to have been exclusively "mechanical", this chapter will probably be the logical - although probably not exclusive - place to discuss that topic.

B. The effects of reservations, acceptances and objections in the case of a reservation that complies with the provisions of article 19 of the 1969 and 1986 Conventions

(a) On the relations of the reserving State or international organization with a party that has accepted the reservation (1969 and 1986, art. 20.4 (a) and (c) and 21.1) (124 (xv));

(b) On the relations of the reserving State or international organization with an objecting party 59/ (1969 and 1986, art. 20.4 (b) and 21.3) (124 (viii), (ix), (x), (xii), (xiii) and (xiv)).

C. The effects of reservations, acceptances and objections in the case of a reservation that does not comply with the provisions of article 19 of the 1969 and 1986 Conventions

(a) On the relations of the reserving State or international organization with a party that has accepted the reservation 60/ (1969 and 1986, art. 20.4 (a) and (c) and 21.1) (124 (v) and (vi));

(b) On the relations of the reserving State or international organization with an objecting party 61/ (1969 and 1986, art. 20.4 (b) and 21.3) (124 (xi) and (xii));

(c) Should a reservation that does not comply with the provisions of article 19 be considered null independently of any objection? (124 (iii) and (iv)).

D. The effects of reservations on relations with other contracting parties

(a) On the entry into force of the treaty (148 (vii));

(b) On relations with other parties inter se (1969 and 1986, art. 21.2).

59/ Including the question of the permissibility of an objection on this assumption.

60/ Including the question of the permissibility of an acceptance on this assumption.

61/ Including the question of the need for an objection on this assumption.

V. FATE OF RESERVATIONS, ACCEPTANCES AND OBJECTIONS IN THE CASE OF SUCCESSION OF STATES

- Significance of article 20 of the 1978 Vienna Convention dealing with newly independent States

A. In the case of newly independent States

(a) Selective maintenance of reservations (1978, art. 20.1);

(b) Fate of acceptances of reservations by the predecessor State in the case of a maintenance of a reservation (148 (ix));

(c) Fate of objections to the reservations of the predecessor State in the case of a maintenance of a reservation (148 (x));

(d) Possibility of a newly independent State formulating new reservations, and their consequences (1978, art. 20.2 and 3) (148 (ix));

(e) Fate of objections and acceptances by the predecessor State with regard to reservations formulated by third States.

B. Other possibilities with regard to the succession of States (148 (ix) and (x))

(a) In cases where part of a State's territory is concerned;

(b) In the case of the unification or division of States (148 (viii));

(c) In the case of the dissolution of States.

VI. THE SETTLEMENT OF DISPUTES LINKED TO THE REGIME FOR RESERVATIONS

(a) The silence of the Vienna Conventions and its negative consequences (124 (vii));

(b) Appropriateness of mechanisms for the settlement of disputes - standard clauses or an additional protocol.

(c) Brief commentary on the proposed outline

(i) Unity or diversity of the legal regime for reservations to treaties

38. It is a question here of determining whether the legal regime for reservations, as established under the Convention on the Law of Treaties of 23 May 1969, is applicable to all treaties, regardless of their object. The question could have been posed on a case-by-case basis with regard to each of the rules. Nevertheless, there are three reasons for conducting a separate and preliminary study:

- Firstly, the terms of the problem are, at least partially, the same, regardless of the provisions in question;

- Secondly, its consideration may be an opportunity for inquiring into some basic general aspects of the regime for reservations, which is preferably done in limine;

- Lastly, this question is at the heart of very topical discussions relating above all to reservations to human rights treaties, which justifies placing the emphasis on the consideration of the specific problems that concern them.

This also involves one of the main difficulties which were stressed by both the members of the Commission at its forty-seventh session as well as the representatives of States in the Sixth Committee at the fiftieth session of the General Assembly. 62/

(ii) Definition of reservations

39. The same holds true with regard to the definition of reservations, a question that was constantly linked during the discussions to the difference between reservations and interpretative declarations and to the legal regime for the latter. 63/ It also seems useful to link the consideration of this question to that of other procedures, which, while not constituting reservations, are, like them, designed to and do enable States to modify obligations under treaties to which they are parties; this is a question of alternatives to reservations, and recourse to such procedures may likely make it possible, in specific cases, to overcome some problems linked to reservations.

40. For reasons of convenience, the Special Rapporteur also plans to deal with reservations to bilateral treaties in connection with the definition itself of reservations: the initial question posed by reservations to bilateral treaties is that of determining whether they are genuine reservations, the precise definition of which is therefore a necessary condition for its consideration. Furthermore, although consideration of the question regarding the unity or diversity of the legal regime for reservations could have been envisaged, it appears at first glance that that question relates to a different problem.

(iii) Formulation and withdrawal of reservations, acceptances and objections

41. Except for some problems linked to the application of paragraphs 2 and 3 of article 20 of the 1969 and 1986 Vienna Conventions, 64/ this chapter does not

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62/ See paragraphs 10 to 16 and footnotes 19 and 22 above.

63/ Ibid. and footnotes 14 and 23.

64/ An exact definition of limited multilateral treaties and gaps in the regime applicable to reservations to the constituent instruments of international organizations, in particular.

appear, prima facie, to involve questions giving rise to serious difficulties. It is nevertheless necessary to include it in the study: this is a matter of practical questions which arise constantly, and one could hardly conceive of a "guide to practice" which would not include developments in this regard. 65/

(iv) Effects of reservations, acceptances and objections

42. This is, without any doubt, the most difficult aspect of the study, and the Commission members and the representatives of States in the Sixth Committee agreed on this point. 66/ This is also the aspect with regard to which apparently irreconcilable doctrinal trends were most clearly in opposition. 67/

43. No one denies that some reservations are prohibited; and this is, furthermore, most clearly evident from the provisions of article 19 of the 1969 and 1986 Vienna Conventions. Nevertheless, their implementation will not be problem-free. These difficulties will have to be dealt with under section A of chapter IV.

44. Disagreement arises really with regard to the effects of reservations, their acceptance and objections that are made to them, as well as the circumstances in which acceptances or objections are either permissible (or impermissible), or necessary (or superfluous). This is at the heart of the opposition between the schools of "admissibility" or "permissibility" on the one hand, and "opposability" on the other. 68/ In the opinion of the Special Rapporteur, it is certainly premature to take a position at this stage and it is not out of the question that the Commission may propose specific guidelines providing useful guidance for the practice of States and international organizations without having to decide between these opposing doctrinal positions. It is also possible that the Commission will be persuaded to borrow from both of them in order to arrive at satisfactory and balanced practical solutions.

45. This is the reason why the general outline reproduced above 69/ does not take any position, even implicitly, on the theoretical questions that divide doctrine. 70/ Assuming that there are, without any doubt, permissible and

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65/ See paragraph 15 above.

66/ See paragraphs 10 to 16 and footnote 16 above.

67/ See preliminary report (footnote 2 above), paragraphs 97-108 and 115-123.

68/ Ibid.

69/ See para. 37, IV.

70/ It should be pointed out again, however, that these questions, "theoretical" as they may be, have very important practical implications.

impermissible reservations, 71/ the Special Rapporteur felt that the most "neutral" and objective method was to deal separately with the effects of reservations, acceptances and objections when the reservation is permissible on the one hand (IV.B) and when it is non-permissible on the other (IV.C), since it is necessary to consider separately two specific problems which, prima facie, are defined in the same terms as a reservation, whether permissible or not, and which concern the effect of a reservation on the relations of the other parties among themselves (IV.D).

(v) Fate of reservations, acceptances and objections in the case of succession of States

46. As is evident from the preliminary report 72/ and some statements made during the discussions in the Commission in 1995, 73/ the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978 left numerous gaps and questions with regard to this problem, which article 20 of the Convention deals with only as concerns the case of newly independent States and without addressing the question of the fate of the acceptances of the predecessor State's reservations and objections that had been made to them or acceptances and objections formulated by the predecessor State to reservations made by third States to a treaty to which the successor State establishes its status as a party.

(vi) The settlement of disputes linked to the regime for reservations

47. The Commission is not in the habit of providing the draft articles that it elaborates with clauses relating to the settlement of disputes. 74/ The Special Rapporteur considers that there is no reason a priori to depart from this practice in most cases: in his opinion, the discussion of a regime for the settlement of disputes diverts attention from the topic under consideration strictly speaking, gives rise to useless debates and is detrimental to efforts to complete the work of the Commission within a reasonable period. It seems to him that, if States deem it necessary, the Commission would be better advised to draw up draft articles which are general in scope and could be incorporated, in

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71/ See para. 43 and sect. IV.A of the general outline above.

72/ See preliminary report (footnote 2 above), paras. 62-71.

73/ See Report, (footnote 3 above), paras. 462-464.

74/ The draft articles on the responsibility of States are the exception: in 1975, it was anticipated that the Commission might decide to add to them a third part on the question of the settlement of disputes and the implementation of responsibility (Yearbook ... 1975, vol. II, pp. 60-64, (A/10010/Rev.1, paras. 38-51); since 1985 "the Commission assumed that a Part Three on the settlement of disputes and the implementation of international responsibility would be included in the draft articles" (cf. aforementioned Report (footnote 3 above), para. 233); it adopted the text of that Part Three in its first reading in 1995 (see ibid., para. 364).

the form of an optional protocol, for example, in the body of codification conventions.

48. Nevertheless, the problem arises perhaps in a somewhat particular manner with regard to the subject of reservations to treaties.

49. As some members of the Commission pointed out during the debate on the subject at the forty-seventh session, although there are, admittedly, mechanisms for the peaceful settlement of disputes, to date they have been scarcely or not at all utilized in order to resolve differences of opinions among States with regard to reservations, particularly concerning their compatibility with the object and purpose of a treaty. 75/ Moreover, when such mechanisms exist, as is frequently the case with regard to human rights treaties, it is particularly important to determine the extent and limits of their powers with respect to reservations. 76/

50. Under these conditions, it may be useful to consider the establishment of mechanisms for the settlement of disputes in this specific area since, in the view of the Special Rapporteur, these mechanisms could be provided for either in standard clauses that States could insert in future treaties to be concluded by them or in an additional optional protocol that could be added to the 1969 Vienna Convention on the Law of Treaties.

Section 3. Conclusion of the chapter

51. It is very clear that the provisional outline of the study proposed above could not be immutable: it must be able to be adapted, supplemented and revised in the course of further work, which, quite obviously, will uncover new difficulties or, on the contrary, will reveal the artificial nature of some of the problems anticipated.

52. It also stands to reason that the study is a mere proposal by the Special Rapporteur, who will gratefully welcome any suggestion that can make it clearer or more complete. Nevertheless, he urges the members of the Commission to bear in mind, in making criticisms and suggestions, the requirements which such an outline must meet in order to carry out fully its functions. 77/

75/ See Report (footnote 3 above), para. 459.

76/ As a result, the position that the existence of provisions establishing a mechanism for the settlement of disputes obviates the need to insert a clause on reservations is at least debatable; see in this regard P. H. Imbert, op. cit. (footnote 43) which gives the example of the statement by the representative of Greece, Mr. Eustathiades, at the United Nations Conference on the Representation of States in Their Relations with International Organizations, and according to which the adoption of a protocol on the settlement of disputes would have an advantage in that "the delicate problem of reservations would be avoided" (A/CONF.67/C.1/SR.44, para. 50).

77/ See para. 34 above.

53. The study should, in particular, enable the members of the Commission and the representatives of States in the Sixth Committee, on the one hand, to ascertain that the concerns which they expressed during the "preliminary phase" have indeed been taken into account and, on the other hand, to gain in future a rather precise idea of the degree of progress made in the work as it progresses. The outline is designed to be, as it were, a "compass" enabling the Special Rapporteur to make progress, under the supervision of the Commission, in the difficult mission entrusted to him. It should also constitute the framework for the guide to practice, which the Commission has undertaken the task of elaborating.

54. The Special Rapporteur feels that, subject to unforseen difficulties, the task can and should be carried out within four years. If the above-mentioned outline is followed, and taking into account the fact that the second chapter of this report deals with the question of the unity or diversity of the legal regime for reservations (chap. I of the provisional outline of the study),

- Chapters II and III ("Definition of reservations" and "Formulation and withdrawal of reservations, acceptances and objections", could be submitted to the Commission at its forty-ninth session;

- The very important and difficult chapter IV ("Effects of reservations, acceptances and objections") could be dealt with the following year;

- And the first reading of the guide to practice in respect of reservations to treaties could be completed in 1999 with the consideration of chapters V ("Fate of reservations, acceptances and objections in the case of succession of States") and VI ("The settlement of disputes linked to the regime for reservations"),

it being clearly understood that, like the general outline itself, these indications are only and can be only of a purely contingent nature.